No. 307.

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

HARRY B. TEDROW, AS UNITED STATES DISTRICT ATTORNEY FOR THE DISTRICT OF COLORADO, APPELLANT,

v.

A. T. LEWIS & SON DRY GOODS COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

BRIEF FOR APPELLANT.

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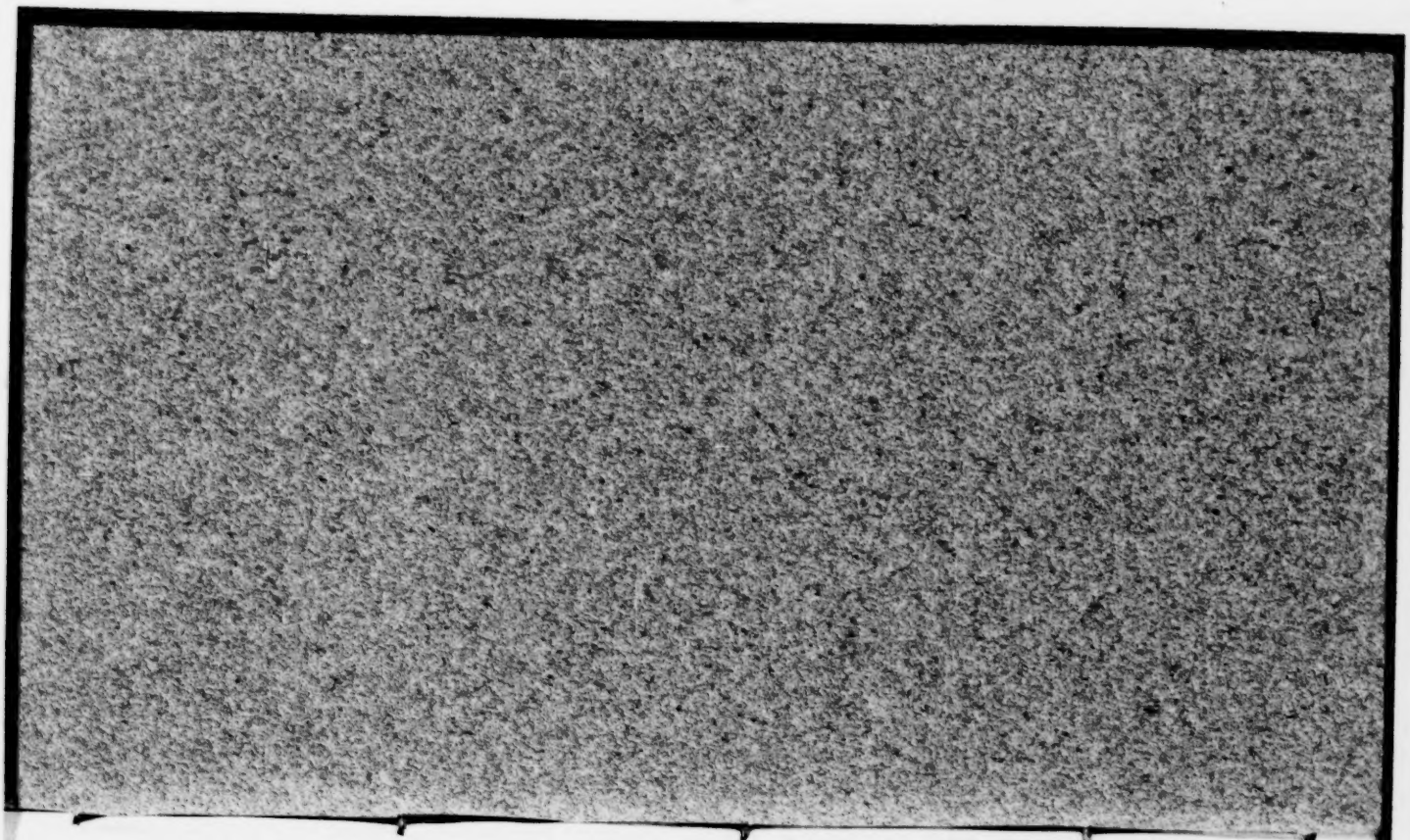

INDEX.

AUTHORITIES CITED.

STATUTES.

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

HARRY B. TEDROW, AS UNITED STATES District Attorney for the District of Colorado, Appellant,
v.
A. T. LEWIS & SON DRY GOODS COMPANY, et al.

No. 357.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

BRIEF FOR APPELLANT.

STATEMENT.

This case is here on appeal from a decree rendered by the District Court enjoining the appellant, as United States district attorney, from instituting prosecutions against the appellees, dealers in wearing apparel, on the charge that they were selling their goods at unjust and unreasonable prices in violation of the Lever Act of August 10, 1917 (40 Stat., c. 53, p. 276), as amended by the act of October 22, 1919 (41 Stat., 1st sess., c. 80, p. 297).

STATUTE INVOLVED.

The Food Control or Lever Act was passed in August, 1917, as a war measure. Its object, gen-

erally speaking, was to establish and maintain governmental control of necessaries during the war. In its definition of necessaries, however, it did not include wearing apparel. The act of October 22, 1919, amended the Lever Act so as to include wearing apparel and in some other respects. The pertinent part of that act is section 2, which is as follows:

> That it is hereby made unlawful for any person willfully to destroy any necessaries for the purpose of enhancing the price or restricting the supply thereof; knowingly to commit waste or willfully to permit preventable deterioration of any necessaries in or in connection with their production, manufacture, or distribution; to hoard, as defined in section 6 of this act, any necessaries; to monopolize or attempt to monopolize, either locally or generally, any necessaries; to engage in any discriminatory and unfair, or any deceptive or wasteful practice or device, or to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries; to conspire, combine, agree, or arrange with any other person, (*a*) to limit the facilities for transporting, producing, harvesting, manufacturing, supplying, storing, or dealing in any necessaries; (*b*) to restrict the supply of any necessaries; (*c*) to restrict distribution of any necessaries; (*d*) to prevent, limit, or lessen the manufacture or production of any necessaries in order to enhance the price thereof; or (*e*) to exact excessive prices for any necessaries, or to aid or abet the doing of any act made unlawful by this section. Any person violat-

ing any of the provisions of this section upon conviction thereof shall be fined not exceeding $5,000 or be imprisoned for not more than two years, or both: *Provided*, That this section shall not apply to any farmer, gardener, horticulturist, vineyardist, planter, ranchman, dairyman, stockman, or other agriculturist, with respect to the farm products produced or raised upon land owned, leased, or cultivated by him: *Provided further*, That nothing in this act shall be construed to forbid or make unlawful collective bargaining by any cooperative association or other association of farmers, dairymen, gardeners, or other producers of farm products with respect to the farm products produced or raised by its members upon land owned, leased, or cultivated by them.

The part of this section which is directly involved in this case is that it shall be unlawful "to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries," and that any person offending against this provision shall, upon conviction, be fined not exceeding $5,000 or be imprisoned for not more than two years, or both. By the first proviso the section is not to apply to any farmer or other agriculturist with respect to the products of the farm owned, leased, or cultivated by him. By the second proviso nothing in the act is to be construed to forbid *collective bargaining* by cooperative associations, or other associations of producers, of farm products with respect to the products of their own members.

THE BILL.

The bill alleges, in substance, that the plaintiffs are merchants dealing in wearing apparel, and the defendant, as United States district attorney, is about to institute prosecutions against them on the charge that they are selling their goods at unjust and unreasonable prices. An injunction against these prosecutions is sought. The ground of relief alleged is twofold.

1. It is alleged (and this allegation is admitted by the answer) that there is a difference between these merchants and the district attorney as to what the act means by an unreasonable rate or charge; that the district attorney insists that, in determining whether any particular rate, charge or price for wearing apparel is just or unjust, reasonable or unreasonable, excessive or nonexcessive, sole regard must be had to the original cost to the merchant of the specific article in question, while the plaintiffs insist that the present value thereof at the time when the merchant fixes, makes, or exacts the rate, charge, or price thereof must be taken into consideration.

2. It is insisted that the act of October 22, 1919, is unconstitutional and void for the following reasons:

(*a*) That there were no conditions existing at the time of the passage of this act or since which authorized Congress to exert its war powers.

(*b*) That in failing to provide a standard for determining what prices are unreasonable the act is too vague and uncertain to be enforced without depriv-

ing the merchant of the rights guaranteed to him by the Constitution.

(*c*) That the classification made in the act whereby those engaged in certain occupations, pursuits, and businesses are wholly exempt from the operation thereof is unjust, unreasonable, arbitrary, and deprives the plaintiffs of their property and rights without due process of law.

(*d*) That the penalties provided are so unusual, excessive, cruel, and drastic as to be unconstitutional. (Rec., pp. 4–18.)

RULING OF THE COURT BELOW.

The court below, without an opinion, held the act of October 22, 1919, unconstitutional and granted the injunction.

BRIEF.

I.

A controversy as to the proper construction of a criminal statute does not authorize an injunction against prosecutions under that statute.

The first ground of relief is that these merchants and the United States district attorney differ as to what matters must be taken into consideration in determining whether a given price is reasonable or unreasonable. This presents simply a question as to the proper construction of the statute, which, of course, may be determined in the first criminal case that arises under it. It may be conceded that it is now settled that, when a court of equity holds an act of Congress to be unconstitutional, it has the power, if the other facts necessary to give it jurisdiction exist, to

enjoin a prosecution under the act. But it is equally well settled that no mere controversy as to the meaning of a criminal law can form any basis for relief by injunction. The present state of the law on this subject was so admirably stated by the Circuit Court of Appeals for the Second Circuit in the case of *Jacob Hoffman Brewing Co.* v. *M'Elligott*, 259 Fed. 525, that I am content to refer to that case. Moreover, the injunction was, in express terms, based on an adjudication that the act of October 22, 1919, was unconstitutional. I therefore pass to a consideration of the constitutional questions raised.

II.

A state of war existed on October 22, 1919, and it was competent for Congress to enact such war measures as it deemed necessary to assure an adequate supply and an equitable distribution of the necessaries of life.

The Government's argument in support of this proposition is fully stated in the case of *United States* v. *L. Cohen Grocery Company*, No. 324, which will be heard and considered by the court with this case. What is there said is, therefore, now referred to and adopted as a reply to the contention made in this case by the appellees.

III.

The act of October 22, 1919, is not subject to the objection that it is too vague and uncertain.

The argument of the Government in support of this proposition has also been presented in the brief in the case of *L. Cohen Grocery Company*, *supra*, and is referred to and adopted in this case.

IV.

The exclusion from the act of farm products in the hands of the producer is not an arbitrary and unconstitutional classification.

It is next insisted that the act in question is not the law of the land and deprives the appellees of their property without due process of law because the provisos to section 2 of the act of October 22, 1919, constitute an arbitrary classification. These provisos are as follows:

> *Provided*, That this section shall not apply to any farmer, gardener, horticulturist, vineyardist, planter, ranchman, dairyman, stockman, or other agriculturist, with respect to the farm products produced or raised upon land owned, leased, or cultivated by him: *Provided further*, That nothing in this act shall be construed to forbid or make unlawful collective bargaining by any cooperative association or other association of farmers, dairymen, gardeners, or other producers of farm products with respect to the farm products produced or raised by its members upon land owned, leased, or cultivated by them.

The rules by which this court is guided in determining whether a classification adopted for the purposes of legislation is arbitrary and unconstitutional have been so often stated that it would be impracticable and wholly unnecessary to review all the cases. In the case of *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78, Mr. Justice Van Devanter, in disposing of a contention that a statute was directed against

pumping from wells bored or drilled in the rock but not against pumping from wells not penetrating the rock, and against pumping for the purpose of collecting gas and vending it apart from the waters but not against pumping for other purposes, summarized the previous decisions of the court as follows:

> The rules by which this contention must be tested, as is shown by repeated decisions of this court, are these: 1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any State of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.

It is also well settled that a classification may be made based upon degrees of the evil sought to be remedied. The law may seek to control all the means contributing to an existing evil. On the other hand,

it may conclude that, if some of the more powerful means are controlled, it will not be necessary to extend the control to some other means which may, in its judgment, contribute in a lesser degree to the evil. Thus, it has been said:

> The legislature is entitled to estimate degrees of evil and to adjust its legislation according to the exigency found to exist. (*Price v. Illinois*, 238 U. S. 446, 453.)

And again:

> If a class is deemed to present a conspicuous example of what the legislature seeks to prevent, the Fourteenth Amendment allows it to be dealt with although otherwise and merely logically not distinguishable from others not embraced in the law. (*Central Lumber Co. v. South Dakota*, 226 U. S. 157, 160–161.)

In sustaining an act of a State legislature which, in terms, excluded from its operation certain institutions, it was said:

> The legislation under review was directed at certain evils which had arisen, and the legislature, considering them and from whence they arose, might have thought or discerned that they could not or would not arise from a greater freedom to the institutions mentioned than to individuals. (*Mutual Loan Co. v. Martell*, 222 U. S. 225, 235.)

The citation of only a few of the many cases decided by this court will illustrate the very wide discretion which Congress or the State legislatures may exercise in making classifications for the purpose of

legislation without coming in conflict with either the Fifth or the Fourteenth Amendment.

In *German Alliance Insurance Co.* v. *Kansas*, 233 U. S. 389, it was held that a State law fixing maximum rates to be charged for fire insurance could be made applicable to all fire insurance companies, including mutual insurance companies, except farmers mutual insurance companies insuring only farm property. The law applied to all mutual fire insurance companies except those of the special class named. And yet the court said that the classification could not be held merely arbitrary.

In *Carroll* v. *Greenwich Insurance Co. of New York*, 199 U. S. 401, 411, an objection was made to a statute forbidding fire insurance companies from combining as to rates, because it did not include in the provision companies engaged in other lines of insurance, but the court said:

> Again, if an evil is specially experienced in a particular branch of business, the Constitution embodies no prohibition of laws confined to the evil, or doctrinaire requirement that they should be couched in all-embracing terms. It does not forbid the cautious advance, step by step, and the distrust of generalities which sometimes have been the weakness, but often the strength, of English legislation (p. 411).

The legislature may forbid the doing by one class of individuals of a thing which others are permitted to do when there is any reason for drawing a distinction between the danger to the public, according

to whether the thing is done by the one or the other class. Thus, a State statute required that all notes given in payment for patented articles should be void unless in a certain form, designed to give notice on their face that they were executed to pay for patented articles. The act expressly provided, however, that it should not apply to merchants and dealers who sell patented things in the usual course of business. This statute was assailed as containing an arbitrary classification. This court, however, called attention to the fact that the legislature might very well deem the public sufficiently protected if traveling agents and others likely to make extravagant representations were controlled by the act, and that the same restrictions were not necessary in the case of merchants not engaged specially in pushing the sales of patented articles, but selling such articles only along with others and in the usual course of business. This difference between the two classes of individuals was held sufficient to sustain the classification as within the power of the legislature. *Ozan Lumber Co.* v. *Union County Bank*, 207 U. S. 251.

In *Heath & Milligan Co.* v. *Worst*, 207 U. S. 338, 354–356, the State statute involved required all mixed paints to be so labeled as to show their true composition, unless made of pure linseed oil, carbonate of lead or oxide of zinc, turpentine, Japan dryer, and pure colors, and all substitutes for linseed oil in the preparation of paints to be clearly shown on the label. It was insisted that there was arbi-

trary discrimination here between different kinds of paints, but the court said:

> We have declared many times, and illustrated the declaration, that classification must have relation to the purpose of the legislature. But logical appropriateness of the inclusion or exclusion of objects or persons is not required. A classification may not be merely arbitrary, but necessarily there must be great freedom of discretion, even though it result in "ill-advised, unequal, and oppressive legislation." *Mobile Co.* v. *Kimball*, 102 U. S. 691. * * * Evils must be met as they arise and according to the manner in which they arise. * * * At any rate, exact wisdom and nice adaptation of remedies are not required by the Fourteenth Amendment, nor the crudeness nor the impolicy nor even the injustice of State laws redressed by it. * * * But be this as it may, there is a distinction between the paints, and the evils to which the statute was addressed may not exist or be as flagrant in one as in the other. * * * Legislation which regulates business may well make distinctions depend upon the degrees of evil without being arbitrary or unreasonable.

In other words, in order to make valid the enactment of a law to prevent those things which are believed by the legislature to contribute most flagrantly to a given evil, it is not necessary that other things contributing in a lesser degree shall also be prohibited. Likewise, the statute may be made applicable to a class of individuals believed to be glaringly respon-

sible for the evil and not applicable to another class who may be also, but in a lesser degree, responsible.

In the case of *International Harvester Company* v. *Missouri*, 234 U. S. 199, 210, a State antitrust statute was assailed because it did not embrace vendors of labor and also because it discriminated between vendors and purchasers of commodities. And after saying that classification is not invalid because of simple inequality, the court said:

> Therefore, it may be there is restraint of competition in a combination of laborers and in a combination of purchasers, but that does not demonstrate that legislation which does not include either combination is illegal. Whether it would have been better policy to have made such comprehensive classification it is not our province to decide. In other words, whether a combination of wage earners or purchasers of commodities called for repression by law under the conditions in the State was for the legislature of the State to determine.

In the case just cited, as illustrating the nature of differences which would justify discriminations, the following previous decisions were referred to: In *German Alliance Insurance Co.* v. *Kansas*, 233 U. S. 389, 418, a distinction was sustained, against a charge of discrimination, between stock fire insurance companies and farmers' mutual insurance companies. In *Missouri, Kansas & Texas Ry. Co.* v. *May*, 194 U. S. 267, 269, a difference was made between landowners as to liability for permitting certain noxious

grasses to go to seed on the land. In *Williams* v. *Arkansas*, 217 U. S. 79, 90, the statute sustained made a difference between persons in the solicitation of patronage on railroad trains and at depots. In *Watson* v. *Maryland*, 218 U. S. 173, 179, a difference was based on the qualifications of physicians. In *Western Union Telegraph Co.* v. *Commercial Milling Co.*, 218 U. S. 406, a distinction was made between common carriers in the power to limit liability for negligence. In *Engel* v. *O'Malley*, 219 U. S. 128, a distinction between vendors was sustained. And in *Provident Institution for Savings* v. *Malone*, 221 U. S. 660, deposits in savings banks were distinguished from deposits in other banks in the absence of a statute of limitation. And the court added (234 U. S. 214):

> Other cases might be cited whose instances illustrate the same principle and in which this court has refused to accept the higher generalizations urged as necessary to the fulfillment of the constitutional guaranty of the equal protection of the law, and in which we, in effect, held that it is competent for a legislature to determine upon what differences a distinction may be made for the purpose of statutory classification between objects otherwise having resemblances.

In *Rast* v. *Van Deman & Lewis*, 240 U. S. 342, 357–358, the statute imposed a tax on merchants using trading stamps. The business engaged in by these merchants was the same as that engaged in by other merchants and it was conducted in the same way, with the

sole exception that they used trading stamps, which was in the nature of an advertising scheme. This difference alone was recognized by the court as furnishing ample justification for the classification. It was said:

> It is established that a distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it, and the existence of that state of facts at the time the law was enacted must be assumed. *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78. It makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety. *Chicago, Burlington & Quincy R. R.* v. *McGuire*, 219 U. S. 549; *German Alliance Ins. Co.* v. *Kansas*, 233 U. S. 389, 413, 414; *Price* v. *Illinois*, 238 U. S. 446, 452.
>
> It is the duty and function of the legislature to discern and correct evils, and by evils we do not mean some definite injury but obstacles to a greater public welfare. *Eubank* v. *Richmond*, 226 U. S. 137, 142; *Sligh* v. *Kirkwood*, 237 U. S. 52, 59. And, we repeat, "it may make discriminations if founded on distinctions that we can not pronounce unreasonable and purely arbitrary." *Quong Wing* v. *Kirkendall*, 223 U. S. 59, 62, and the cases cited above.

In *Quong Wing* v. *Kirkendall*, 223 U. S. 59, a tax on persons engaged in the laundry business other than the steam-laundry business, and exempting women where not more than two were engaged, was

held to be valid. Thus, a discrimination based both upon the kind of power used and the sex and number of employees was sustained. The power of a legislature to make discriminations based upon a belief that it may be consistent with the public welfare to prohibit one class of persons or corporations from doing business that other classes are permitted to do is well illustrated by the case of *Mutual Loan Co.* v. *Martell*, 222 U. S. 225, 231–235. That case dealt with a statute making invalid, unless certain requirements were complied with, the assignment of wages to be earned, but exempting from the operation of the act "national banks and banks which are under the supervision of the bank commissioner, and certain loan companies." It would seem that the difference between the reasons for applying an act of this kind to employees generally and for not applying it to the corporations named above is rather shadowy and uncertain. But this court could see that the legislature might conceivably find a reason satisfactory to it for the discrimination, and hence declined to pass on the soundness of that reason. Another striking case is *Griffith* v. *Connecticut*, 218 U. S. 563. The statute in that case fixed the maximum rate of interest to be charged by others than national banks, State banks, or trust companies, or licensed pawnbrokers, and provided that it should not apply to bona fide mortgages on real and personal property. Why, in the excepted cases, the rate of interest which might be charged should be unlimited and in all other cases of the lending of money be

limited to the maximum allowed by the statute would not seem to be very clear, but the court was of opinion that the business of the excepted companies and the way in which it was conducted differed sufficiently from the business of others engaged in lending money to justify the discrimination. In *Barrett* v. *Indiana*, 229 U. S. 26, a mining regulation applying to bituminous coal mines but excluding block coal mines was sustained. In *Keokee Coke Co.* v. *Taylor*, 234 U. S. 224, 227, a statute required mining and manufacturing companies to redeem in cash orders given to employees payable in merchandise. It was insisted that this was an arbitrary discrimination against mining and manufacturing companies, because the same restriction was not imposed upon the other companies and persons issuing similar orders, but the court said:

> The suggestion that others besides mining and manufacturing companies may keep shops and pay their workmen with orders on themselves for merchandise is not enough to overthrow a law that must be presumed to be deemed by the legislature coextensive with the practical need.

In *Central Lumber Co.* v. *South Dakota*, 226 U. S. 157, a statute, among other things, prohibited dealers from selling goods at different prices in different parts of the State, after making allowance for any difference in the cost of transportation. It was insisted that this was an arbitrary discrimination against dealers who happened to be doing business

in two places, because it might well be that at one of these places a dealer would be guilty if he charged a certain price when his competitor at that place might charge the same price and be guilty of no offense. It was held, however, that the discrimination was one which it was in the power of the legislature to make. In *New York Central R. R.* v. *White*, 243 U. S. 188, 208, it was held that in a compulsory compensation act some kinds of employees could be included and others engaged in less dangerous occupations excluded.

Between one who sells only that which he himself produces and one who is engaged in both buying and selling there is a marked difference, and clearly this difference can be made the basis of legitimate classification.

In *American Sugar Refining Co.* v. *Louisiana*, 179 U. S. 89, 95, the court said:

> The constitution of Louisiana classifies the refiners of sugar for the purpose of taxation into those who refine the products of their own plantations, and those who engage in a general refining business, and refine sugars purchased by themselves or put in their hands by others for that purpose, imposing a tax only upon the latter class. To entitle a party to the exemption it must appear (1) that he is a farmer or a planter; (2) that he grinds the cane as well as refines the sugar and molasses; (3) that he refines his own sugar and molasses, meaning thereby the product of his own plantation. Whether he may also refine the

> sugar of others may be open to question; although, by its express terms, the act does not apply to planters who granulate sirup for other planters during the rolling season. The discrimination is obviously intended as an encouragement to agriculture, and does not deny to persons and corporations engaged in a general refining business the equal protection of the laws.

If it be said that there is any distinction in this respect between tax statutes and other statutes, the answer is found in *St. John* v. *New York*, 201 U. S. 633. That case involved a statute regulating the vendors of milk. It provided different regulations and a different standard for vendors producing their own milk and vendors who purchased milk from others and then sold it. The result was that one vendor might purchase his milk from another, who was a producer. The two might, at the same time, sell milk to the same customer, and each sell milk produced by the latter, with the result that the nonproducing vendor could be convicted of an offense for which the producing vendor would be acquitted, and yet the court held that there was such a difference between a producing and a nonproducing vendor as to justify the discrimination.

It has not been attempted, by any means, to review all the cases in which discriminatory legislation has been discussed by this court. The cases referred to are sufficient to show: (1) That in determining whether a classification is valid or invalid, it is always

necessary to look to the evil sought to be corrected; (2) that it is within the discretion of the legislature to determine whether a statute shall include the whole evil or be directed at only those things which contribute in a more important way to the evil.

It is pertinent, therefore, to inquire what evil was intended to be corrected by the provision of the law now under consideration. That provision is not merely that no necessaries shall be sold at unjust or unreasonable prices. The offense denounced is—

> to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries.

It is well known that the cost to the consumer of any article is made up of a number of charges. The producer must be reimbursed the cost of production and, in addition, expects a profit to pay for his labor and the use of his capital. He does not ordinarily sell direct to the consumer. Before the product reaches the consumer it must bear the cost of transportation and handling in various ways. In addition, it has generally been sold several times, each purchaser reselling it at a profit. The commission merchant, the broker, the jobber, the wholesaler, and the retailer, each with his profit, helps to make up the final price which the consumer must pay. The wording of the statute is significant and obviously intended to regulate the amount which each of these handlers or sellers shall receive for the service rendered. It would have availed little to say that the merchant who finally sells to the consumer shall charge only a reasonable

price if, in order to get his goods, he should have to pay an exorbitant charge to all who had handled the product after it left the producer.

Some of the other provisions of the act in question are broader, but it may well be doubted whether this particular provision applies at all to the producer. Apparently it is directed at those into whose hands products pass after leaving the producer. It is manifestly directed at handlers of and dealers in necessaries. In the ordinary acceptation of the word, a dealer is one who both buys and sells, and is thus to be distinguished from one who manufactures or produces and sells only his own product. In Words and Phrases, Vol. 1, at pages 1222–1223, the cases are quoted holding that dealers "are the middlemen between the manufacturers or producers and consumers." And in 13 Cyc., page 283, a dealer is defined as "a person who buys to sell again, and not one who buys to keep, or makes to sell."

Obviously the chief object of this legislation was to prevent extortionate charges and profits by these middlemen. The President in calling the attention of Congress to the necessity for this legislation referred at length to prevailing conditions as to high prices and, coming to the subject of remedies, said:

> The Attorney General has been making a careful study of the situation as a whole and of the laws that can be applied to better it and is convinced that, under the stimulation and temptation of exceptional circumstances, combinations of producers and combinations

> of traders have been formed for the control of supplies and of prices which are clearly in restraint of trade, and against these prosecutions will be promptly instituted and actively pushed which will in all likelihood have a prompt corrective effect. (58 Cong. Rec., pt. 4, p. 3729.)

These were matters as to which existing laws were regarded as sufficient. Coming to the conditions which demanded additional legislation, he said:

> There can be little doubt that retailers are in part—sometimes in large part—responsible for exorbitant prices; and it is quite practicable for the Government, through the agencies I have mentioned, to supply the public with full information as to the prices at which retailers buy and as to the costs of transportation they pay, in order that it may be known just what margin of profit they are demanding. Opinion and concerted action on the part of purchasers can probably do the rest. (58 Cong. Rec., pt. 4, p. 3729.)

He then recommended the appropriation by Congress of sufficient funds to pursue these inquiries and called attention to the fact that existing law was inadequate and that amendments should be made to the Food Control Act. The Act now under consideration was the result. If the particular provision upon which the indictment in this case was based is, as indicated above, directed only at handlers and dealers as distinguished from producers, the objection of arbitrary discrimination at once disappears.

Under that construction the manufacturer, as well as the farmer, is exempt, and Congress has simply put in one class the producer, whether a manufacturer or a farmer, and in another those who handle and deal with a product after it leaves the hands of the producer. It would scarcely be denied by anyone that this is a justifiable classification. If, however, this prohibition must be said to apply to manufacturers, its application is clearly limited to a charge for that which corresponds with handling or dealing in the articles sold. There is no prohibition against making unreasonable charges for manufacturing any article. If when the manufacturer sells his article he can be said to make an unreasonable charge for handling or dealing in it, then he is simply made amenable to the same law that controls merchants and others who handle or deal in his goods. The farmer is the primary producer of the country. In many respects he belongs in a class of his own. In the light of the cases referred to above, the legislature might very well conclude either that the existing evil consisted in the adding to the price obtained by the farmer exorbitant charges on the part of those who handle and deal in his product, or that from his situation it is not probable that he will be able, to any considerable extent, to extort unreasonable prices for his product.

It may have been assumed that the degree of his offending, if he offended at all, was much less than that of the middleman, and not sufficient to require action on the part of Congress. It may also have

been the view of Congress that every encouragement to increase production of farm products was of vital importance and would tend strongly to control ultimate prices. Hence, it may have been deemed wise to leave the farmer unrestricted and confine the remedial laws to holding middlemen down to reasonable charges. This would surely be ample justification for the classification adopted.

It is said that the exemption in favor of the farmer, with respect to his own products, applies to all the acts denounced by the statute, and that there is no apparent reason why the farmer should be permitted to destroy necessaries for the purpose of enhancing the price or restricting the supply if all other persons are forbidden to do so. The legislature obviously, however, did not anticipate that there was reasonable probability that a farmer would do anything of this kind. It was not to be supposed that he would destroy his own product in the hope that the result would be to increase the price which others might charge for theirs. Such acts could not reasonably be anticipated except upon the part of great combinations which might, after acquiring something like a monopoly, destroy a part of what they had in order that the law of supply and demand would justify an exorbitant price for what remained. Under the authorities cited above, this difference between the farmer and others would be a sufficient basis for the classification. It is true that there would be other persons owning limited quantities of necessaries who would have no more

inducement than the farmer to destroy them, but as said in *Keokee Coke Co.* v. *Taylor, supra*, this fact "is not enough to overthrow a law that must be presumed to be deemed by the legislature coextensive with the practical need." (Page 227.)

To justify the exemption of the farmer, there is, therefore, the purpose and duty of Congress to encourage increased production of farm products and the presumption that, with the charges allowed to be made by middlemen, he will obtain for his products only what is justified by the law of supply and demand; the fact that, situated as he is, he is powerless to enhance, to an unreasonable extent, the prices of what he has to sell, and the conclusive presumption that in the judgment of Congress a sufficient remedy would be provided by placing restrictions upon others without placing the same restrictions upon him. In these are found all the elements required by repeated decisions of this court to justify classification for purposes of legislation.

So far as decisions of this court go, the sole reliance of appellees is *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, in which an antitrust statute of the State of Illinois was declared unconstitutional because it was enacted therein that "the provisions of this act shall not apply to agricultural products or live stock while in the hands of the producer." That case, however, has been distinguished in a number of the cases referred to herein. The distinction between it and the present case is equally as clear. The act there condemned forbade all combinations to restrict

trade, limit production, increase prices, prevent competition, etc. The exemption was not limited to permitting a farmer to do as he pleased with his own products. On the contrary, the exemption was in favor of agricultural products or live stock while in the hands of the producer.

In other words, if this was a valid exemption, any number of farmers could enter into a combination or agreement that each should deal with his own products in such a way as to limit production, increase prices, or prevent competition. By such an argument, a farmer would control not only his own products but the products of all other farmers in agreement with him. Here the exemption of the first proviso is carefully confined to acts which affect only his own products, and the second proviso is limited to the single matter of "collective bargaining." There is a vast difference between permitting a man to do as he pleases with his own and permitting him to enter into combinations, the result of which is to control not only his own but that which belongs to many others. The objects and purposes of that statute and the extent of its exemption are so radically dissimilar to those of the present statute that the *Connolly* case would scarcely be cited but for the fact that, in general, the exemption operated in favor of the class of individuals to whom the exemption in the present statute is extended.

For the reasons stated, it is confidently insisted that the act of October 22, 1919, is not subject to any

constitutional objection upon the ground of arbitrary classification or discrimination.

V.

The penalties provided are not so unusual, excessive, cruel, and drastic as to be unconstitutional.

It is finally contended that the penalties provided for a violation of this act are so unusual and excessive as to render the act unconstitutional. I confess to some difficulty in understanding what is the basis of this contention. The act simply imposes a fine or imprisonment, or both, in the discretion of the court, the fine not to exceed $5,000 and the imprisonment not to exceed two years. It is exactly the same provision for penalties constantly found in acts of Congress. It permits the judge to measure the punishment according to the seriousness of the offense and places, as the limit beyond which he can not go, what may almost be said to be the usual limit fixed by Congress in enacting criminal statutes. It is true that, by daily and repeated violations of the Act, an offender may make himself subject to fines aggregating an enormous sum and to imprisonment for a long term of years. But it is scarcely competent for a person to assail the constitutionality of a statute prescribing a punishment for burglary, for instance, on the ground that he had committed so many burglaries that, if punishment for each were inflicted upon him, he might be kept in prison for life. *O'Neill* v. *Vermont*, 144 U. S. 323, 331. Under the terms of this Act a judge may

impose upon an offender an exceedingly light punishment. Certainly until some person has had an unduly severe sentence imposed upon him the Act can not successfully be assailed upon the ground that it puts it within the power of a judge to render a severe sentence. It is true that if these appellants had seen fit to pursue their business in violation of the statute, they would, in the very nature of things, have become subject to almost numberless prosecutions with very large aggregate penalties. This might justify a judge in lending an easy ear to the application for injunction if he entertained any serious doubt as to the constitutionality of the statute. *Ex parte Young*, 209 U. S. 123. But if the act is constitutional, the appellants can not be subjected to heavy, or even any, penalties unless they persist in violating the law. If they do this, they must pay the penalty, and there is no ground of equitable jurisdiction.

CONCLUSION.

It is respectfully submitted that the act in question is in all respects constitutional and valid and that the decree granting an injunction is erroneous and should be reversed.

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Solicitor General.

SEPTEMBER, 1920.

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